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No. 418

In The

Supreme Court of the United States

LUCIAN J. CILETTI, GEORGE H. KRAUSE, ALLAN SCHULTZ, in their own behalf and in behalf of the other citizens of the City of Washington and Borough of East Washington,

Appellants

v.

THE CITY OF WASHINGTON, BOROUGH OF EAST WASHINGTON, WASHINGTON-EAST WASHINGTON JOINT AUTHORITY, THE CITIZENS WATER COMPANY OF WASHINGTON, PENNSYLVANIA, and MELLON NATIONAL BANK AND TRUST COMPANY, TRUSTEE, Defendants, and PEOPLES BANK OF UNITY, JAMES M. LAMBIE, and RUSSELL M. WYLIE, Intervening Defendants,

Appellees

On Appeal from the Supreme Court of Pennsylvania, Western District.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The time for docketing the above-entitled case was extended to and including October 3rd, 1958, as shown by the order of Your Honorable Court dated September 13, 1958, a copy of which is attached hereto as an Addendum.

Appellants appeal from the final judgment of the Supreme Court of Pennsylvania (opinion filed March 17, 1958; petition for reargument denied April 17, 1958) affirming the opinion of the Court of Common Pleas of Washington County, Pennsylvania, No. 5146 in Equity, entered October 8, 1956, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the Supreme Court of Pennsylvania is reported in 392 Pa. 204, 140 A. 2d 98. The opinion of the court below is not reported. The record part including all opinions of the Court of Common Pleas is hereto attached as Appendix C. Adjudication of the chancellor, Appendix C. The petition for reargument, the answer, the exceptions filed in the Court of Common Pleas after the notice of appeal was filed are set out in Appendix A.

JURISDICTION

This suit in equity was brought by Lucian J. Ciletti, George H. Krause and Allan Schultz, in their own behalf and in behalf of the other citizens of the City of Washington and the Borough of East Washington, to restrain the illegal actions of the appellees. The judgment of the Supreme Court of Pennsylvania was entered March 17, 1958, and the petition for reargument, filed under Rules 69 and 71 of the Supreme Court of Pennsylvania, was denied April 17, 1958, notice of appeal was filed in that Court and in the Court of Common Pleas of Washington County, Pennsylvania, on July 15, 1958. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U. S. Code, Sections 1257 and 2101 (b), and by certiorari under 28, U. S. Code, Section 2103.

QUESTIONS PRESENTED

1. May the Supreme Court of Pennsylvania ignore a petition for reargument questioning the qualification of one of its members?

2. May the Supreme Court of Pennsylvania and the court below deprive appellants of their federal rights by capriciously refusing to pass upon basic questions of fact?

3. May the Supreme Court of Pennsylvania deprive appellants of their federal rights by refusing to pass upon basic questions of law?

4. May the Supreme Court of Pennsylvania capriciously foreclose appeal by making a finding of "laches" contra its own law and the undisputed facts of the case, and use such finding in bar, both prospectively and retrospectively, of appellants' federal rights?

5. The opinion and decree of the Supreme Court of Pennsylvania is a perfect incongruity in that it condemns the long-term contracts, yet, by decree, protects and perpetuates them.

6. Do the statutes, ordinances, and contracts deprive appellants, and those similarly situated, both presently and prospectively, of their liberty and property without due process of law and of equal protection of the laws on the following grounds, considered severally or collectively?

(a) Through the device of long-term, unadvertised, and non-competitive contracts made by the mayor purporting to act for the City and by the Burgess pur-

porting to act for the Borough, and by virtue of the ordinances enacted pursuant to said contracts, all of the sewer properties, assets, income, and powers vested by law in the City, the Borough, and the Authority, were forthwith transferred and surrendered to private corporations and private individuals for a term of forty years, thereby depriving appellants and others similarly situated, both presently and prospectively, of their properties and fundamental rights;

(b) Upon surrendering their properties and powers as aforesaid, the Authority also agreed not to attempt to interfere therewith except by affirmative vote of at least four of the Authority's five-member board, any such attempt being already foreclosed by other provisions of the contracts;

(c) The ordinances imposed charges (including a minimum charge for no use) for the construction, maintenance, repair, operating, and financing of sewer facilities most of which were

(1) non-existent, and

(2) outside the scope of the advertised and chartered purpose of the Authority;

(d) The facilities were designed and to be built for the accommodation of adjoining municipalities not members of or contributors to the Authority and in no way bound to use or to pay for the facilities;

(e) The ordinances authorized the entry of liens, many hundreds of which are now entered, against appellants and others similarly situated, for sewer services which, even in instances where actually rendered, were involuntarily received under penalty of fine and imprisonment for failure to pay;

(f) Under the ordinances, so long as they are permitted to stand, appellants and others similarly situated have been subjected, and will continue to be subjected, to threat of fine and imprisonment for non-payment?

7. In dismissing taxpayers' contentions that the municipal ordinances and the state statutes which authorized the contracts in controversy were unconstitutional and void, and that various contracts connected therewith were fraudulent, unlawful, and void, have appellants been deprived of due process and the equal protection of the laws due them from the trial and appellate tribunals of Pennsylvania, where:

(a) The application of the doctrine of laches to appellants' claims has effectively deprived them of their right to a judicial decision of the issues presented to the state tribunals;

(b) The application of the doctrine of laches by the Supreme Court of Pennsylvania will, if allowed to stand, operate both retrospectively as to payments exacted from appellants in the past, and prospectively as to payments to be exacted from appellants and other persons similarly situated for the next thirty-six years, all such exactions being fundamentally illegal and made under duress and penalty of fine and imprisonment;

(c) The decision and opinion of the Supreme Court of Pennsylvania expressly acknowledges "the surrender of power and managerial control by the Authority through the device of long-term contracts"—a device illegal under the state law—but fails to stop

this illegality, or to forestall its continued operation as an unlawful burden on appellants and others similarly situated;

(d) In applying laches to appellants' constitutional claims on the basis of a period of five months following publication of the ordinances, the state tribunals have arbitrarily ignored the state law respecting public policy and the fundamental requirements of laches; said finding of laches has been arbitrarily used by the state tribunals to avoid a decision on the merits;

(e) The Supreme Court of Pennsylvania has entered its decision and opinion "per curiam", not withstanding that (1) Mr. Justice Musmanno dissented without opinion, (2) the application of the doctrine of laches under the state law requires the exercise of judicial discretion both at trial and on appellate review, and (3) under the state law a decision per curiam is reserved for cases where the court is all of one mind, and the issue is so clear that the opinion need not be elaborated by extended discussion;

(f) The Supreme Court of Pennsylvania declined to grant rehearing of their decision "per curiam", notwithstanding that appellants' petition for reargument invited the Court's attention to the fact that the member of the Court who announced its decision from the bench had directed an investigation of appellants' claims while the case was pending below, in his then capacity as Attorney General of Pennsylvania; the results of said investigation were not made a part of this record, and were not made available to appellants during the course of the trial?

8. The refusal of the Court to find all the material and undisputed facts, and consider them, was in violation of due process.

9. The evasion of the rights of so many, who are being offered into forty years of bondage, by saying, "No inference is to be drawn from our action in this matter that we approve the surrender of power and managerial control by the Authority through the device of long-term contracts." (Opinion, Supreme Court of Pennsylvania), yet not deciding, was a gross judicial denial of due process.

STATUTES INVOLVED

The statutes in question are the following Acts of Assembly of the Commonwealth of Pennsylvania:

The Municipality Authorities Act of May 2, 1945, P.L. 382, as amended and supplemented, 53 Purdon's Statutes sec. 301, Appendix A;

The Act of July 18, 1935, P.L. 1286, as amended and supplemented, 53 Purdon's Statutes sec. 2231, Appendix A;

The Act of April 14, 1949, P.L. 482, as amended, 53 Purdon's Statutes sec. 2261, Appendix A.

The ordinances in question (which have the effect of statutes for the purpose of determining constitutional questions) are:

Ordinance No. 10 of 1953 of the City of Washington, Pennsylvania, enacted June 25, 1953 (Record, 245a-256a), Appendix C;

Ordinance No. 266 of the Borough of East Washington, Pennsylvania, enacted June 17, 1953 (Record, 256a), Appendix C.

The contracts in question (which have the effect of statutes for the purpose of determining constitutional questions) are:

Contract dated June 1, 1953, between the mayor of the City of Washington and the Washington-East Washington Joint Authority (Record 54a-79a), Appendix C;

Contract dated June 1, 1953, between the burgess of the Borough of East Washington and the Authority (Record, 79a), Appendix C;

Contract dated May 11, 1953, between the Authority and the Citizens Water Company of Washington, Pennsylvania (Record, 80a-91a), Appendix C;

Contract dated June 1, 1953, between the Authority and Mellon National Bank and Trust Company (Record 108a-245a), Appendix C.

STATEMENT OF THE CASE

This is a class suit filed by appellants, on December 4, 1953, in behalf of themselves and the other citizens of the City of Washington and the Borough of East Washington, against the City of Washington, the Borough of East Washington, Washington-East Washington Joint Authority, The Citizens Water Company of Washington, Pennsylvania, and Mellon National Bank and Trust Company, Trustee, defendants, and Peoples Bank of Unity, James M. Lambie, Russell M. Wylie, intervening defendants. The suit was filed to restrain the levying and collection of involuntary charges and liens, and the imposition of fines and imprisonment for non-payment thereof, and to suspend the enforcement of contracts, ordinances, and statutes authorizing the same.

The Washington-East Washington Joint Authority was organized by the City of Washington (hereinafter called the City) and the Borough of East Washington (hereinafter called the Borough) and was chartered May

19, 1950, under the provisions of the Pennsylvania Municipality Authorities Act of 1945, the stated purpose being "to construct and or otherwise provide the facilities necessary to furnish the *TREATMENT* of sewage wastes . . ." from the City and Borough and from the adjoining townships which the sewer project was designed to serve.

At irregular intervals, during the three years following the date of incorporation, the Authority Board, in collaboration with its fiscal agents and counselors, privately evolved a package of contracts and ordinances ostensibly to finance the sewer project but actually for unlawful private gain.

The sewer plan finally adopted, in addition to providing for the treatment of sewage as specified in the charter and advertised in the ordinances, provided for rehabilitation and extension of all internal sewer facilities in the City and the Borough, the accommodation of several adjoining townships, the construction of a $697,000.00 interceptor sewer leading to the treatment plant, and the transporting to and treatment of all these wastes at the treatment plant. The sewer plan as finally adopted was hidden and unannounced until the Spring and Summer of 1953, when the package of contracts and ordinances was made. The package consisted of ordinances imposing charges (guised as "current revenues" instead of "taxes") and penalties and imprisonment for non-payment thereof, a bond issue in the face amount of $2,650,000.00, a 40 year Trust Indenture to retire the same, and other long-term contracts. All these contracts were unadvertised and "negotiated". They were prepared and recommended by advisers and counselors representing both the Authority and the municipalities, or the Authority and the Trustee

for the bondholders, their compensation to be on a fee "contingent on the Authority getting in business and selling the bonds".

Pursuant to a basic contract signed by the mayor alone for the City and dated June 1, 1953, all City sewer facilities were conveyed to the Authority for $1, and by it pledged to the Trustee for the bondholders. Similarly, all sewer facilities of the Borough were conveyed to the Authority for $1 and pledged by it with the Trustee for the bondholders.

Calculation of sewer charges began as of July 1, 1953, and billing therefor began later in the same month. The charges were for a complete sewer system as if completed according to plan, and for the support of unconscionable and illegal contracts. The plan was designed for the accommodation not only of the participating City and Borough, but of the non-participating townships as well. Construction of the planned sewer changes did not begin until July 9, 1953 and they were not yet completed at the time of hearing in 1955.

Appellants (plaintiffs) filed their complaint in equity December 4, 1953, complaining, inter alia, that the sewer project was the culmination of a concealed conspiracy of some of the defendants using exaggerated sewer needs as a screen for a package of contracts calling for ordinances, charges, liens, fines, and imprisonment, by threat of which the plaintiffs and other citizens are unlawfully and unconstitutionally deprived of their property and fundamental rights, because, inter alia,

1. The charges were shockingly high, having been made by and for the personal aggrandizement of the con-

spirators, under the requirements of the "negotiated" contracts pursuant to which the ordinances were passed.

2. The charges, initially and for several years thereafter, were mostly for facilities which were non-existent, and for whose construction there was no proper authority.

3. The charges, though guised as "current revenue", are actually taxes levied without due process of law and for illegal purposes, and subject the taxpayer and his property to liens, penalties, and imprisonment for nonpayment thereof.

4. The Authority Board abdicated its duties and functions and, on the "closing date", July 8, 1953, handed over all properties and significant rights of the Authority (formerly of the City and Borough) to the Trustee for the bondholders, and made itself helpless to resist the Trustee, and became subservient to it and to other contract holders under control of the Trustee.

After passage of the ordinances, hundreds of thousands of dollars of delinquent charges accumulated against protesting taxpayers, and many hundreds of liens were entered.

Defendants' objections of "laches" were several times dismissed.

Defendants' objection of "*laches*" to the original complaint was *dismissed by the lower court by decree of February 9, 1954* (Appendix C, p. 6a). However, the court sustained objection to the complaint on other grounds, but gave the plaintiffs limited leave to amend. Plaintiffs, claiming the right to amend generally, appealed to the Pennsylvania Supreme Court which allowed plaintiffs' claim by opinion and order filed September 27, 1954, reported in 378 Pa. 641 (107 A. 2d 871), holding:

"The order of the (lower) court is set aside with procedendo in accordance with this opinion. Costs to abide the event."

The lower court then decreed: "Per Curiam. And now, this 26th day of October, 1954, in accordance with the procedendo dated September 27, 1954, awarded by the Supreme Court of Pennsylvania . . . (3) Defendants' Preliminary Objection . . . *that Plaintiffs are precluded by their laches from obtaining equitable relief, is dismissed.*"

Plaintiffs' amended complaint and rule were filed November 23, 1954. Defendants' objections thereto (including the objection of *laches*) *were dismissed by Order dated March 25, 1955.*

After answer and hearing, the Chancellor filed his Adjudication, and Decree Nisi, on May 8, 1956, dismissing the amended complaint (Appendix C, pp. 345a et seq.). To this, plaintiffs filed hundreds of exceptions relating mostly to uncontroverted basic facts, dismissed as irrelevant by the lower court in its opinion and decree of October 8, 1956 (Appendix C, p. 481a et seq.) (Appendix B, p. 93 et seq.).

From this decree, the plaintiffs appealed to the Supreme Court of Pennsylvania, which, by its "Per Curiam," opinion and order of March 17, 1958, to which one of the Justices dissented, reported in 392 Pa. 204, 140 A. 2d 98, affirmed the decree of the lower court, but at the cost of the defendant Authority. The opinion states, inter alia:

"It is unnecessary to discuss and decide each of appellants' numerous contentions, because we are of the opinion that their action is barred by laches. . ."

"No inference is to be drawn from our action in this matter that we approve the surrender of power and managerial control by the Authority through the device of long-term contracts. Mitchell v. Chester Housing Authority, 1957, 389 Pa. 314, 132 A. 2d 873."

HOW THE FEDERAL QUESTIONS ARE PRESENTED

The appellants raised the constitutional questions in the pleadings (Appendix C, pp. 37a et seq., 41a et seq.) and in the requests for findings of fact and conclusions of law (Appendix C, p. 293a et seq.) in the exceptions to the Adjudication and Decree of the chancellor (Appendix C, p. 411a et seq.) in the appeal to the Supreme Court of Pennsylvania, appellants' brief (Appendix B), and in the petition for reargument (Appendix A).

The chancellor disposed of the many constitutional questions as follows (Appendix C, p. 405a et seq.):

"First: The Municipality Authorities Act of 1945 is constitutional."

"Second: The Sewer Rental Act of 1935 is constitutional."

"Fourth: All of the ordinances are valid and constitutional."

"Ninth: The agreements between the municipalities and the Authority did not involve an unconstitutional delegation of power to the Authority."

"Eleventh: The Authority had the power to enter into the agreement with the Management Company."

"Twelfth: The Authority had the power to enter into the agreement with the Water Company."

"Thirteenth: In its agreement with the Management Company, the Authority did not make any unconstitutional delegation of its powers."

"Fourteenth: In its agreement with the Water Company, the Authority did not make any unconstitutional delegation of its powers."

"Twenty-second: Under the Municipality Authorities Act of 1945, the Authority was not required to advertise for or solicit competitive bids for printing, engineering, or legal services, or for services rendered it by the Water Company, Management Company, its fiscal adviser, or the Trustee."

"Twenty-fourth: The manner in which the bonds were sold, the price at which they were sold, and the interest rate payable thereon were all in accordance with the Municipal Authorities Act of 1945."

"Twenty-sixth: The trust indenture between the Mellon National Bank and Trust Company and the Authority was lawful and valid."

"Twenty-seventh: Under the trust indenture, the Authority did not unconstitutionally delegate any of its power."

"Thirtieth: The charges imposed by the City and the Borough upon the users of the system are not taxes."

The Supreme Court disposed of them as follows:

"It is unnecesary to discuss and decide each of appellants' numerous contentions, because we are of the opinion that their action is barred by laches. . ."

"No inference is to be drawn from our action in this matter that we approve the surrender of power and managerial control by the Authority through the device of long-term contracts. Mitchell v. Chester Housing Authority, 1957, 389 Pa. 314, 132 A. 2d 873."

THE QUESTIONS ARE SUBSTANTIAL

No government is better than its courts.

The questions affect not only the citizens of these two communities, but by reason of the increasing trend toward the creation of Authorities, they will in the future determine what protection is afforded others by the federal constitution to a Republican Form of Government, due process, etc., in their involuntary use of the facilities under the control of such Authorities.

This is a suit by the sovereign, i.e., a plea of the people to the Court, where the people have no control or right of referendum by ballot.

The Supreme Court of Pennsylvania did not consider the controlling decision of the United States Supreme Court in *William H. Carson v. Sewer Commission of Brockton*, 182 U.S. 393.

The Supreme Court of Pennsylvania did not consider but ignored the question of the qualification of one of its

members raised in the petition for reargument, as more fully set forth in Appendix A. When the court ignored the question, it followed the philosophy of "the king can do no wrong", which has no place in due process.

The Supreme Court of Pennsylvania refused to decide whether the involved Acts of Assembly authorized the things done here; and, if they do grant such authority, whether they are constitutional in that respect.

The Supreme Court of Pennsylvania refused to decide whether the ordinances, if they authorized what was done here, were constitutional.

The Supreme Court of Pennsylvania refused to decide whether the delegations of authority under the indenture and under the long-term contracts (which had the effect of statutes) were constitutional.

If this decision is permitted to stand, many of the citizens of the City and Borough, under the threat of fine and imprisonment, will be obliged to pay the original assessments which were illegal under the decisions of the Supreme Court of Pennsylvania, *Gericke v. City of Philadelphia*, 353 Pa. 60, and under the decisions of the Supreme Court of the United States; and they and their children and successors, for a period of from 20 to 40 years, will be prevented from objecting to the wrongs imposed upon them under and by virtue of the admitted illegal combination.

After having said,

> "It is unnecessary to discuss and decide each of appellants' numerous contentions, because we are of the opinion that their action is barred by laches. . .",

it may have eased the conscience of the writer and the court to say,

> "No inference is to be drawn from our action in this matter that we approve the surrender of power and managerial control by the Authority through the device of long-term contracts. Mitchell v. Chester Housing Authority, 1957, 389 Pa. 314, 132 A. 2d 873."

however, it no more effectively removed the taint of an unjust judgment than did the remark of the ancient judge when he said, "I wash my hands of this man's blood."

The scheme of the operation as set up by the ordinances and the indenture, and that resulted in the surrender of power and managerial control by the Authority through the device of the long-term contracts with controlled private interests, was violative of the principles stated in *Driscoll v. Burlington-Bristol Bridge Company*, 86 A. 2d 201, when that opinion quoted from *Trist v. Child*, 21 Wall. 441, 88 U.S. 441, 450, 22 L. Ed. 623, 625 (1875) (Appendix B, p. 63):

> "The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed the fabric must fall. Such is the voice of universal history. * * * The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative,

touching the performance of their functions, he is bound to exhibit truth, frankness and integrity. Any departure from the line of rectitude in such cases is not only bad in morals but involves a public wrong."

The court refused to consider or pass upon the actual evils of the unlawful combination which were proven at the trial to have occurred between the time the suit was filed and the close of the hearing, and which, of course, can be expected to repeat themselves during the continuance of the long-term contracts, and said,

> "We have come to see that putting these investigations in the laps of the courts necessarily means proceedings which are slow, cumbersome, expensive, and possibly inefficient. The notoriety accompanying recent investigations of authorities in Lackawanna and Delaware Counties by Grand Juries are clear evidence of how cumbersome remedies requiring criminal proceedings must be. We do not consider it the duty of the judiciary to point out a plan for control and regulation, but we do consider it our duty to call to the attention of the legislative and executive branches of our government the inadequacy of the existing judicial remedies to the end that legislation may be framed and enacted to provide necessary public administration, audits, regulations, and controls for these new and rapidly expanding agencies, which have been created to furnish needed services to the people of this Commonwealth." (Appendix C, pp. 511a and 512a)

The Supreme Court of Pennsylvania dismissed the matter on the ground of laches, notwithstanding the prior dismissal of the "laches" plea several times by the lower

Court and notwithstanding the rules stated by it in *Wilson v. School District of Philadelphia*, 195 A. 90 (328 Pa. 225).

Laches never licenses future wrong-doing because a malefactor has previously persisted in his practice.

Any wrongs that may have been done in the five months before suit was filed does not warrant their continuance for 39 years and seven months, on the ground of laches.

The opinion does not consider or apply the rule that the charging of the citizens for proposed facilities before they are constructed is a violation of due process. *Gericke v. City of Philadelphia*, 353 Pa. 60.

The opinion does not consider or apply the rule that the imposition of a tax by a municipality for the construction of facilities for the benefit of adjoining municipalities is a violation of due process.

> "The public purposes of a state for which it may raise funds by taxation embrace expenditures for *its* general welfare or the personal protection of *its* citizens." 16A C.J.S. p. 953, sec. 648.
>
> "Uses which have been held private and, therefore, objectionable as depriving *the taxpayer* of property without due process of law are assistance to individuals or corporations to establish or carry on manufacturing of various kinds, loans to private individuals for their own profit, and *support of a school not under the control of the town authorities.*" 16A C.J.S. p. 954, sec. 648. (Emphasis supplied.)

The opinion does not consider or apply the rule that the payment of the charges as here imposed under the

duress of impending fine and imprisonment is in violation of due process. *William H. Carson v. Sewer Commission of Brockton*, supra.

The extent to which plaintiffs may have prejudiced others by filing the Complaint on December 4, 1953 instead of earlier, and the extent to which the several defendants themselves were responsible for various delays in this case and their own undoing could only be considered in an opinion from the legal viewpoint, after all the material and relevant facts were properly found and determined. Absent such findings, the conclusions violate the requirements of "due process".

This case was tried largely by cross-examining the defendants and their officers. There was little dispute about the facts. The appellants (plaintiffs) filed 220 requests for findings of fact, most of which were undisputed and yet arbitrarily ignored by the trial judge (Appendix C, pp. 293a-334a) (Appendix B, p. 93 et seq.).

The judgment of the Court of Common Pleas and the judgment of the Supreme Court of Pennsylvania were arbitrary and capricious, and thereby violate the most fundamental rights of the people.

The Supreme Court and the court below failed to distinguish between an Authority which is created for the purpose of establishing or taking over a public service and collecting a rental or fee from those who voluntarily elect to avail themselves of it, and a case like the present where the citizens have no choice: the first type is financed and operated with the expectation of being self-liquidating, depending upon its attractiveness and the voluntary use thereof by the public generally.

The Questions Are Substantial

Appellants (plaintiffs) contended that the whole project resulted, primarily, from a scheme to use the state's police power as a club with which to mace the people. If this be true we should not have to go far to find evidences of it in the implementation, i.e., in the ordinances and contracts, which the appellate courts have the right to construe.

The Supreme Court of Pennsylvania said:

> "No inference is to be drawn from our action in this matter that we approve the surrender of power and managerial control by the Authority through the device of long-term contracts. Mitchell v. Chester Housing Authority, 1957, 389 Pa. 314, 132 A. 2d 873." In that case the court said (p. 328):
>
> "The principle of the foregoing cases is clear, namely, good administration requires that the personnel in charge of implementing the policies of an agency be responsible to, and responsive to those charged with the policy-making function, who in turn are responsible to a higher governmental authority, or to the public itself, whichever selected them. This chain of responsibility is the basic check on government possessed by the public at large. A contract which will have the effect of, and indeed appears to have been executed with the express purpose of, violating this rule runs counter to public policy and will not be enforced against the public interest."

Returning to the case at bar, let us suppose, arguendo, that every single bondholder is an innocent holder for value, whose *investment* should be protected. The "investment" would be tangible and traceable, either to money

in the bank or facilities in the field, representing value *received.*

But the Management contract, and the Service contract, and the Trustee's contract are long-term contracts *for services to be rendered in the future.* Not only are they for services not yet received, but they are for so-called "services" which ought never to be contracted away, for they violate the citizens' fundamental rights of political sovereignty. To hire a manager on a current basis is a far different thing from giving a contractor (manager) a 40-year exclusive right to hire and fire all employes of the Authority and to fix the number and the rates of pay of all persons to be paid by the Authority.

Yet it is as to these rights that the Court said:

> "Clearly, to now overlook and excuse the plaintiffs (sic) delay would prejudice . . . the Management Company, the Water Company, and the Trustee."

Plaintiffs are unable to understand why it is essential to deny the fundamental rights of the people in order to preserve to the Manager the privilege of hiring and firing whom it pleases for 35 more years, for which "service" the Authority is committed to pay the Manager more than a million dollars!

The Supreme Court of Pennsylvania had said, in the case of *Wilson v. School District of Philadelphia,* 328 Pa. 225, 195 A. 90,

> "We have not been able to discover any case which holds that laches will bar an attack upon the constitutionality of a statute as to its future operation, especially where the legislation involves a fundamen-

tal question going to the very roots of our representative form of government and concerning one of its highest prerogatives. To so hold would establish a dangerous precedent, the evil effect of which might reach far beyond present expectations."

Yet, here, the court said,

> "It is unnecessary to discuss and decide each of appellants' numerous contentions, because we are of the opinion that their action is barred by laches."

The chancellor, on the other hand, after changing his position on "laches", had gone on to explain (377a):

> "While, as will appear below, the Chancellor is of the opinion that the plaintiffs have been guilty of laches and are therefore barred from prosecuting this action, the issues raised and the charges made by the plaintiffs are of so serious and important a nature that the Chancellor feels that a thorough discussion of said issues and charges should be furnished so that the litigants and their counsel, and the members of the court en banc and the appellate court (if this case should again come before them) may have the use and benefit of the long experience, research, conclusions, and opinion of the Chancellor."

In the case at bar, appellants believe that resort to the provisions of the contracts themselves is made necessary by the illusory findings and conclusions of the lower court. A few typical examples will suffice:

Plaintiffs had requested a finding to the effect (App. C, 326a):

> "176. That the Authority bonds are not straight revenue bonds."

Mr. Fisher, a partner in the firm of Singer, Deane and Scribner, fiscal agent for the Authority, had been asked (Record, 1028a):

> "Q. (By the Court) Is there any obligation anywhere on the part of the City of Washington or the Borough of East Washington to pay the interest or sinking fund requirements on the bonds out of any fund *other than monies collected from sewer rentals*?
>
> A. There is, sir."

The Adjudication states (App. C, 370a):

> "(e) The principal and interest on the bonds is payable out of the revenues of the Authority *derived from the sewage works.*"

and plaintiffs' request No. 176, supra, was dismissed as irrelevant and immaterial (492a).

Similarly dismissed as irrelevant and immaterial (492a) was plaintiffs' request (325a):

> "166. That the amounts of delinquency stated by the defendants in open court cannot be reconciled."

The amounts and the discrepancies are very substantial (Record, 746a, 904a), yet the Adjudication states (375a):

> "78. The financial affairs of the Authority have always been open to public inspection."

and (409a):

> "Thirty-seventh: The plaintiffs have failed to show that they are entitled to any relief."

A final example: The plaintiffs had complained (28a, 29a, 33a, 343a, 470a) that the Manager is, in effect, but an

agent of the Trustee, and that the Authority is at the mercy of both, under the arbitration provisions shown (App. C, 106a).

Yet the Adjudication (360a) describes this situation as follows:

> "(f) in the event of any dispute between the Authority and the Manager the dispute is to be settled by arbitration in accordance with the Act of April 25, 1927, P. L. 381."

No attempt can be made here to exhaust the many similar instances abounding throughout the record and touched upon in Appendix B, p. 94 et seq.

The contracts, likewise, contain many illusory provisions which are internally repugnant, one of the most conspicuous being the literal inclusion of section 4-C of the Authorities Act (Appendix A, infra), reading:

> "The Authority shall have no power at any time or in any manner to pledge the credit or taxing power of the Commonwealth of Pennsylvania or any political subdivision, nor shall any of its obligations be deemed to be obligations of the Commonwealth of Pennsylvania or of any of its political subdivisions, nor shall the Commonwealth of Pennsylvania or any political subdivision thereof be liable for the payment of principal of or interest on such obligations."

In the instant case, the Trustee for the bondholders does not mace the people. It has employed the Authority to employ the City and Borough to do the macing for it by passing the ordinances called for in the contracts and Trust Indenture (Appendix C, 111a, 146a).

The Questions Are Substantial

The Supreme Court of Pennsylvania condemned this type of repugnancy in *Hamilton's Appeal*, 340 Pa. 17, 16 A. 2d 32, where the court said (p. 25):

> "The fact that a special fund will be created is of no importance . . . 'If the fund from which the obligations are to be paid is to be created by the levy of a tax under the general power of taxation vested in the municipality, ALTHOUGH THE CONTRACT STIPULATES THAT NO GENERAL INDEBTEDNESS FOR THE STIPULATED AMOUNT SHALL BE CREATED AGAINST THE CITY, and that the only obligation undertaken by the city is to LEVY, ANTICIPATE, AND PLEDGE THE TAX AGREED TO BE IMPOSED, *indebtedness is created*, and the contract is void if the existing indebtedness of the municipality has reached the constitutional limit." (Emphasis supplied).

But the lower court dismissed plaintiffs request No. 173, showing the debt limit of the City (exception No. 153, Appendix C, 492a) as irrelevant and immaterial (488a).

> "The police power cannot be indiscriminately used as a prop to thrust the constitution aside. More particularly is this so with respect to the debt section."
>
> *Commonwealth ex rel. Schnader v. Liveright et al.*, 308 Pa. 35, 80.

Similarly, in *Gemmill v. Calder et al.*, 332 Pa. 281, the court said:

> "It is objected that the remedy given the Authority and its bondholders in the event of default are beyond the powers of the municipality to assume. [The

default provision follows] * * *. This provision must be eliminated from the contract; our determination is based upon the fact that this is done. In the event of default, the remedy of the bondholders will be limited to the right to take over the property and to operate it, making reasonable charges for the service rendered: Trantor v. Allegheny Co. Authority, supra; Kelley v. Earle, supra. In so far as the agreement attempts to secure additional rights for the Authority or the bondholders, it could not be sustained. Section 4 of the 'Municipality Authorities Act of 1935,' as amended . . . provides: 'The Authority shall have no power at any time or in any manner to pledge the credits or taxing power of the Commonwealth of Pennsylvania or any political subdivisions, ...'"

We shall now touch briefly on a few salient features of the trust indenture in the instant case (page references are to the Record):

A. Immediately, and before default, everything that the Authority had was assigned to and pledged with the trustee (177a, 365a (p)).

B. Every bondholder is charged with notice of every provision of the trust indenture (124a).

C. The bond debt structure (137a, 1188½a) forestalls maturity of a million dollars of bonds until the final year, 1993. Meanwhile, the bonds are redeemable only at a premium, and in *inverse* order of their maturity (198a).

D. A battery of special funds is established with a total dollar capacity and facility for manipulation entirely beyond the needs reasonably required for protection of the bondholders (175a, et seq.).

E. The indenture requires that the Authority have a "Consulting Engineer" at all times suitable to the trustee (128a, 211a), and gives him tremendous powers, including (213a) the power to create obligations through reconstruction and extensions of the sewer system, and to control (with the Trustee) the budget and charges therefor, except that the Authority might, by a vote of 4 to 1, overrule the Consulting Engineer.

Appellants contended that the Authority delegated legislative power to the Consulting Engineer and Trustee, and that the Authority abdicated its duties and functions and agreed not to resume them except by a vote of 4 to 1.

The defendants argued that no legislative power was unlawfully delegated, and that the Authorities Act, section 309 (Appendix A, infra), authorizes the 4 to 1 vote in the following language:

> "C. A majority of the members shall constitute a quorum of the board for the purpose of organizing the Authority and conducting the business thereof and for all other purposes, and all action may be taken by vote of a majority of the members present, unless in any case the by-laws shall require a larger number."

The Authorities Act also gives the Authority (Appendix A, sec. 306 B, (h)) the power "To fix, alter, charge and collect rates and other charges in the area served by its facilities. . . ."

In the *Wilson* case, supra, the court said:

> "'Under a well balanced constitution the legislature can no more delegate its proper function than

can the judiciary. It is on the preservation of the lines which separate the cardinal branches of the government, that the liberties of the citizen depend. . . .' "

"This principle, though not expressly written in our constitution, embodies its basic strength if it is to endure as our fundamental law. It has been so considered since we have been a state: its main essentials have been rigidly adhered to. We have had many cases before this court wherein legislation has been assailed because of the delegation of legislative power. It is impossible in the short time allotted to us for this opinion to attempt to review these cases and set up some all-embracing rule that might be a guide as to what is and what is not delegation. ONE CARDINAL PRINCIPLE STANDS OUT, THAT ANY FUNDAMENTAL OR BASIC POWER NECESSARY TO GOVERNMENT CANNOT BE DELEGATED." (Emphasis supplied.)

"That the power to tax is peculiarly a power of the legislature has never been questioned in this country and has been frequently been asserted by our courts . . . The taxing power, one of the highest prerogatives, if not the highest, of the legislature, must be exercised through representatives chosen by the people. It is clearly within the interdiction of this principle of constitutional government against delegation."

"To give these bodies the unrestricted right to levy a tax is unthinkable in a free country under our constitution. We have enough illustrations abroad to know what could happen."

"These decisions seem to be based on the fact that the tax levying authorities were non-elective bodies, that they were appointed without the consent of the people. . . ."

"Delegation to a fact-finding body of the power to do something that is in itself circumscribed, after facts are found, is not the delegation of a legislative function. BUT WHERE THE DELEGATION TO A FACT-FINDING BODY EMPOWERS IT TO CREATE THE CONDITIONS WHICH CONSTITUTE THE FACT, THAT IS LEGISLATIVE." (Emphasis supplied.)

"In the instant case, it has been shown beyond all doubt that the statutory provision delegating the taxing power to a *non-elective* school board, of which the control of the people is remote and indirect, violates one of the most fundamental principles of our constitution, and this court must perform its duty, in spite of the delay."

The Supreme Court of Pennsylvania did not consider the delegation of power by the legislature to the Authority, and in turn, the re-delegation by the Authority to the Consulting Engineer, who was made plenipotent, and to private corporations, is in direct violation of Article III, sec. 20 of the Pennsylvania Constitution:

"The General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever."

Purdon's Pa. Stat. Ann., Constitution.

The Questions Are Substantial

Even though a delegation to an Authority may be legal, and even though the delegation to a municipality of the power to delegate to an Authority may be legal, the re-delegations *by* the Authority *to private interests* are unconstitutional and illegal.

> "Redelegation. While the legislature may, subject to constitutional restrictions, delegate its powers in certain respects to local government bodies, such local bodies may not, at least in the absence of express authorization, delegate their powers or duties except such as purely ministerial or executive . . ."
>
> 16 *C.J.S.* sec. 140, p. 651.

As to "laches", appellants' position is sufficiently set forth in the "Plaintiffs' Memorandum Re Laches" attached to the Petition for Reargument (Appendix A), and in the Brief (Appendix B).

> "The present action was filed on December 4, 1953, more than five months after the publication dates of the ordinances last mentioned."

The ordinances could say nothing of the Trust Indenture, the master contract, which was not closed until July 8, 1953, and was still inaccessible for some time later. If, in fact, defendants' actions and motives were reprehensible, it would naturally follow that their arrangements would be concealed with the greatest artifice. Counsel for the plaintiffs found the few months preceding the preparation and filing of the complaint hardly enough to realize the serious implications of the intricate provisions of the Indenture and related contracts.

Country lawyers sometimes take years to dig up what city lawyers bury in a few months, and vice versa.

There is, in fact, no need to consider laches in the instant case. The chancellor found laches for the first time in his adjudication of May 8, 1956, at which time he also found that there was nothing to criticise, nothing to condemn. How could the chancellor condemn and penalize the people for not seeing the wrong in time to file their complaint in less than 5 months after the trust indenture closing date (July 8, 1953) when he himself saw nothing wrong almost 3 years after the closing date! And if, in fact, there is nothing wrong, what is there to apply "laches" to?

Here, counsel for the Trustee for the bondholders was also bond counsel for the Authority, and counsel for the City was also general counsel for the Authority (and suitable to the Trustee under the Indenture). And these counselors (Record, 575a) and other counselors were serving on a fee contingent on the Authority getting in business and selling its bonds. They have been paid handsomely by the Authority (with the people's money), under the provisions of their Trust Indenture (Appendix C, 225a).

The record in this case clearly shows that the Chancellor was, for several years, little impressed with the plea of "laches". It appears that it finally became the last resort of a hopeless attempt to justify the defendants.

It will be noted in the case at bar that the defendants claim powers exclusively derived, mediately or immediately, from the statutes here in controversy.

> "It is the duty of the court always zealously to guard the constitutional rights of citizens."
>
> 16 *C.J.S.* page 298.

"State courts also have the power and duty to determine whether a state statute violates the federal constitution."

16 *C.J.S.* page 321, note 28.

"On the other hand, the determination of a constitutional question is necessary and proper whenever it is essential to the decision of the case, as where the right of a party is founded solely on a statute, the validity of which is attacked."

16 *C.J.S.* page 320.

While it is not reversible error for the judiciary or any other branch of the state to make innocent mistakes, quite the contrary is true where the action is arbitrary, capricious, or oppressive, for in the latter case is exampled the most conspicuous and most oppressive instance of violation of the citizen's fundamental rights, established in Magna Carta and recognized and preserved as inviolate in our Federal Constitution.

It was the inescapable judicial duty of the lower court to try to find and apply all the uncontroverted basic facts, and the dismissal of great numbers of them in this case was capricious. To receive relevant facts into the record for no other purpose than to create an illusory formal compliance with the fundamental requirements of procedural due process is but a hollow gesture that denies the right to full hearing and to the natural benefits flowing therefrom.

"The solicitude for securing justice embodied in the due process clause is not satisfied by formal compliance or merely procedural regularity".

Carter v. People of State of Illinois, 329 U. S. 173.

The Questions Are Substantial

Where, as here, bonds are issued and long term commitments are made without the vote of the people, by a board not elected by the people, compelling the people by "police power" to pay or be subject to imprisonment, the only protection the people have is their courts.

In the *Driscoll* case, supra, the Court said, p. 222:

"The citizen is not at the mercy of his servants holding positions of public trust nor is he helpless to secure relief from their machinations except through the medium of the ballot, the pressure of public opinion or criminal prosecution. . . ."

". . . as stated previously in this section, the primary functions of the judiciary are to declare what the law is and to determine the rights of parties conformably thereto. . . ."

16 *C.J.S.* page 687, note 74.

"So, it is a matter for the judiciary to pass on the constitutionality of the official and specific acts of the other departments of government, such as the constitutionality of statutes, notwithstanding the determination of this question by the judiciary may have a political effect. It is, likewise, the duty of the judiciary to construe constitutional and statutory provisions, and other laws. . . ."

16 *C.J.S.* page 688, note 78.

"Broadly speaking, the purpose of the guarantee (of 'due process') is to prevent governmental encroachment against, or arbitrary invasion of, the life, liberty, or property of individuals, through executive, legislative, judicial, or administrative authority; . . . to secure, or protect the citizen, or individual, against

arbitrary or oppressive action, or from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice; . . ."

16 *C.J.S.* page 560, note 65.

"While in ordinary cases, we are bound by the state court of last resort respecting matter of fact, it is hardly necessary to say that that court cannot, by omitting to pass upon the basic questions of fact, deprive the litigant of the benefit of a federal right, any more than it could do so by making findings that were wholly without support in the evidence. And just as this court, where its appellate jurisdiction is properly invoked and all the evidence is brought before it, will if necessary for a decision of a federal question, examine the entire record in order to determine whether there is evidence to support the findings of the state court, so it is our duty, in the absence of adequate findings, to examine the evidence in order to determine what facts might reasonably be found therefrom, and which would furnish a basis for the asserted federal right."

Carlson v. Washington, 1914, 34 S. Ct. 717, 234 U. S. 103, 58 L. Ed. 1237.

The United States Supreme Court has the ultimate power to search the records in state courts where a claim of constitutionality is effectively made, so that no constitutional freedom, least of all the guarantees of the Bill of Rights, will be defeated by insubstantial findings of fact screening reality.

Milk Wagon Drivers' Union of Chicago, Local 753 v. Meadowmoor Dairies, 1941, 61 S. Ct.

552, 312 U. S. 287, 85 L. Ed. 836, 132 A.L.R. 1200), rehearing denied 61 S. Ct. 803, 312 U. S. 715, 85 L. Ed. 1145.

State courts cannot avoid review by the United States Supreme Court of disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact.

Williams v. State of N. C., 1945, 65 S. Ct. 1092, 325 U. S. 226, 89 L. Ed. 1577, 157 A.L.R. 1366, rehearing denied 65 S. Ct. 1560, 325 U. S. 895, 89 L. Ed. 2006.

See also:

Risley v. City of Utica, 173 Fed. 502;

Republic Acceptance Corporation v. De Land et al., 275 Fed. 632;

Greene et al. v. Louisville & Interurban Railroad Co., 244 U. S. 499.

He whose duty it is to condemn a wrong cannot fail in his duty without thereby increasing the wrong.

No government is better than its courts.

Respectfully submitted,
ANTHONY L. MARINO,
EUGENE C. SLOAN,
WILBUR F. GALBRAITH,
MILES WARNER,
Counsel for Appellants.

October , 1958

ADDENDUM

SUPREME COURT OF THE UNITED STATES

No. , October Term, 1958

LUCIAN J. CILETTI, GEORGE H. KRAUSE, ALLAN SCHULTZ, in their own behalf and in behalf of the other citizens of the City of Washington and Borough of East Washington,

Appellants

vs.

THE CITY OF WASHINGTON, BOROUGH OF EAST WASHINGTON, WASHINGTON-EAST WASHINGTON JOINT AUTHORITY ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for the appellants.

IT IS ORDERED that the time for docketing the above-entitled case and the filing of the record be, and the same is hereby, extended to and including October 3rd, 1958.

WILLIAM J. BRENNAN, JR.,
Associate Justice of the Supreme Court of the United States.

Dated this 13 day of September, 1958.

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

Nos. 63, 64 March Term, 1957

LUCIAN J. CILETTI et al.,
Appellants

vs.

THE CITY OF WASHINGTON et al.,
Appellees

Appeals from the Decree of the Court of Common Pleas of Washington County at No. 5146 in Equity

PETITION FOR REARGUMENT

The petition of Lucian J. Ciletti, George H. Krause and Allan Schultz, appellants in the above case, by their attorneys, Anthony L. Marino, Eugene C. Sloan, Wilbur F. Galbraith and Miles Warner of Beechwood, Lovitt and Murphy, respectfully pray your Honorable Court to grant them a rehearing for the following reasons:

1. The opinion does not consider the controlling decision of the United States Supreme Court in William H.

Carson v. Sewer Commission of Brockton, 182 U. S. 393 (Record, 42a; Brief, 20)

2. The opinion does not consider the application of the rule stated in Wilson v. School District of Philadelphia, 195 A. 90, p. 99 (328 Pa. 225) as follows:

> "We have not been able to discover any case which holds that laches will bar an attack upon the constitutionality of a statute as to its future operation . . . ."

3. The Court overlooked the rule that laches is never a bar to the assertion of constitutional rights where public policy is involved.

> "No principle has become more firmly established in the field of constitutional law than the fact that a person may effectively by acts or omission waive a constitutional right to the protection of which he would otherwise be entitled, PROVIDED the waiver does NOT run counter to PUBLIC POLICY or public morals." Wilson v. School District of Philadelphia, 195 A. 90, p. 100 (328 Pa. 225).

4. The opinion does not consider or apply the rule that the charging of the citizens for proposed facilities before they are constructed is a violation of due process. (Record, 39a et seq.; Brief, 12) Gericke v. City of Philadelphia, 353 Pa. 60.

5. The opinion does not consider or apply the rule that the imposition of a tax by a municipality for the construction of facilities for the benefit of adjoining municipalities is a violation of due process. (Record, 39a et seq.)

> "The public purposes of a state for which it may raise funds by taxation embrace expenditures for ITS

general welfare or the personal protection of ITS citizens." 16A C.J.S. p. 953, sec. 648.

"Uses which have been held private and, therefore, objectionable as depriving THE TAXPAYER of property without due process of law are assistance to individuals or corporations to establish or carry on manufacturing of various kinds, loans to private individuals for their own profit, and SUPPORT OF A SCHOOL NOT UNDER THE CONTROL OF THE TOWN AUTHORITIES." 16A C.J.S. p. 954, sec. 648.

6. The opinion does not consider or apply the rule that the payment of the charges as here imposed under the duress of impending fine and imprisonment is in violation of due process. William H. Carson v. Sewer Commission of Brockton, supra. (Brief, 20 et seq.)

7. If per chance the closing paragraph in the opinion in this case means that the Court was helpless to set aside the management contract because the Management Company was not a party to the action, the Court overlooked the power to join a party at any stage of the proceedings in order to accomplish justice. Anderson, Pa. Civil Practice, Vol. 10, p. 123.

8. The extent to which plaintiffs may have prejudiced others by filing the Complaint on December 4, 1953 instead of earlier, and the extent to which the several defendants themselves were responsible for various delays in this case and their own undoing could only be considered in an opinion from the legal viewpoint, after all the material and relevant facts were properly found and determined. Absent such findings, the conclusions violate the requirements of "due process". (Brief, 42)

9. The opinion in itself is a violation of due process.

10. The opinion fails to consider or pass upon the fact that every payment of charges after the filing of the Class Complaint was a payment under protest. Shaw v. The City of Allegheny, 115 Pa. 46.

11. The approval or disapproval of "the surrender of power and managerial control by the Authority through the device of long-term contracts" was one of the material issues in the court below and its decree approves; the decree in the opinion affirms the judgment of the court below with an implied reservation of disapproval of the contracts. Letkus v. Butler, 69 Pa. 277, 280, 281. Act of May 11, 1871, P. L. 266, 17 PS sec. 91, p. 29.

12. The opinion, by expressing disapproval of the long-term contracts but failing to strike them, and yet attempting to affirm the judgment of the court below approving the contracts, licenses the Water Company and the Management Company to continue to benefit under these illegal contracts to the detriment of present and future interested third parties, sewer users, and bondholders.

13. All the members of the Court not concurring, and the judgment of the court below being affirmed, but with caveat, a per curiam decree was not in order.

> "A phrase used in the reports to distinguish an opinion of the WHOLE court from an opinion written by any one Judge. Sometimes it denotes an opinion written by the chief justice or presiding judge." Black's Law Dictionary, Third Edition.

"A Per Curiam is the opinion of the court in a case in which WE ARE ALL OF ONE MIND, and so clear that we do not think it necessary to elaborate it by an extended discussion." Clarke v. Assurance Co., 146 Pa. 561, 570; see also Miner v. Fike, 93 p. 264 and Newmons v. Lakeworth Drainage Dist., etc., 87 So. 2d 49, 15 LRA 127; Letkus v. Butler, supra, Act of May 1871, P. L. 266, supra.

14. The opinion fails to consider or pass upon the right of the Court to retain jurisdiction as a Court of Equity and to accomplish complete justice between all parties concerned as was done in Wilson v. The City of Philadelphia, supra, and Driscoll, Governor, et al. v. Burlington-Bristol Bridge Co., 86 A. 2d 201 (N.J.).

15. The opinion fails to consider or pass upon the rule that where asserted rights are divisible, laches may be applied divisibly.

"Normally restitution will be denied only where, because of an unreasonable delay, the respondent or third persons would suffer harm if restitution were granted; even if full restitution would work a hardship, partial restitution will often be granted conditioned upon the complainant making compensation for the harm suffered by the delay, if such compensation will prevent the hardship to the respondent." Restatement of the Law, Restitution, sec. 148c, p. 591.

16. The filing of the Complaint on December 4, 1953 tolled laches as to things occurring subsequent to that date. Shaw v. The City of Allegheny, supra.

17. During the progress of the proceedings in the court below, petitioners requested the Honorable Herbert

B. Cohen, the then Attorney General of the Commonwealth of Pennsylvania, to intervene in the case under section 8 of the Act of May 2, 1945, P. L. 382, 53 P.S. 310 and his general powers.

18. The Attorney General, Honorable Herbert B. Cohen, conducted an investigation and study of the case and sent his deputies to Washington County to interview your petitioners and other persons concerning the case.

19. Your petitioners do not know the extent of the investigation and have no knowledge of what the deputies reported to the Attorney General excepting the letter hereto attached and marked Exhibit "A".

20. Subsequently, and prior to the argument of the case at bar, the Honorable Herbert B. Cohen, Attorney General, became a member of your Honorable Court.

21. On Monday, March 17, 1958, the opinion which is hereto attached, was handed down for the Court by his Honor, Justice Herbert B. Cohen.

22. Your petitioners, therefore, respectfully suggest, as a matter of law, that he was disqualified to participate in the consideration and disposition of this case.

23. The opinion fails to consider and preserve the distinction between the governmental nature of school needs (Neiser v. Schuylkill Township School District, supra) and the ministerial or proprietary nature of sewer needs in using the Neiser case as authority in the application of laches in the case at bar.

24. The opinion, by the application of laches, deprives the plaintiffs of their fundamental right to a judicial resolution of constitutional issues in actual controversy in this case.

25. The opinion fails to consider or dispose of plaintiffs' objection that the City and Borough Ordinances, Exhibits H and I, and the Act of July 18, 1935, P. L. 1286, as amended, 53 P.S. 1030, are violative, inter alia, of the Pennsylvania Constitution, Article 3, sec. 7, which provides:

> "The General Assembly shall not pass any local or special law authorizing the creation, extension, or impairing of liens."

26. The opinion fails to consider or obviate the constitutional objections stated in paragraphs 51, 54, 55, 58, and 59 of the Amended Complaint. (Record, 36a et seq.; Brief, 11 et seq.)

27. Attached hereto is the Opinion and marked Exhibit "I"; a memorandum on laches submitted to the court below, and accompanying this petition is a copy of the record and appellants' brief.

Respectfully submitted,

ANTHONY L. MARINO
EUGENE C. SLOAN
WILBUR F. GALBRAITH
MILES WARNER OF BEECHWOOD, LOVITT AND MURPHY
Attorneys for Appellants

By (s) EUGENE C. SLOAN
Eugene C. Sloan

Commonwealth of Pennsylvania,
County of Fayette, ss:

LUCIAN J. CILETTI, being duly sworn according to law, deposes and says that the foregoing petition for

reargument and statements made therein are all presented in good faith and that the said petition is not filed for the purpose of delay.

(s) Lucian J. Ciletti
Lucian J. Ciletti

Sworn to and subscribed before me this 25th day of March, 1958.

(s) Agnes R. Oehling
Notary Public
Title of Officer

(Seal)

My Commission Expires: May 25, 1959.

EXHIBIT "A"

Commonwealth of Pennsylvania
OFFICE OF ATTORNEY GENERAL
Harrisburg

Herbert B. Cohen
Attorney General

November 1, 1956

Eugene Charles Sloan, Esquire
National Deposit Bank
Brownsville, Pennsylvania

Re: Ciletti et al. v. Washington-East Washington Joint Authority

Dear Mr. Sloan:

This will acknowledge receipt of your letter of October 19, 1956, enclosing a copy of the opinion of the court

en banc of Washington County dismissing exceptions to the Chancellor's adjudication in the above case.

We have carefully considered all of the factors in this case and are convinced that you and your associates have raised every possible basis of objection. In view of this, we feel that no substantial purpose would be served by our intervention in this case since we assume that you will carry the case to the appellate courts of the Commonwealth for final determination.

Very truly yours,
(s) Herbert B. Cohen
Herbert B. Cohen
Attorney General

EXHIBIT "1"

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

Nos. 63, 64 March Term, 1957

LUCIAN J. CILETTI et al.,
Appellants

v.

THE CITY OF WASHINGTON et al.,
Appellees

Appeals from the Decree of the Court of Common Pleas of Washington County at No. 5146 in Equity

OPINION OF THE COURT

Opinion Per Curiam, March 17, 1958:

These appeals are from the decree of the Court of Common Pleas of Washington County dismissing a complaint filed by plaintiff taxpayers who seek a declaration that various ordinances, and agreements entered into, in connection with the development of a municipal sewage disposal system are fraudulent, unlawful and void, and ask for the issuance of an injunction restraining the several defendants from billing or collecting charges for the operation of the sewage system.

In 1950 the City of Washington and the Borough of East Washington pursuant to the Municipal Authority Act of 1945[1] created the "Washington-East Washington Joint Authority" for the purpose of providing facilities for the treatment of sewage in those municipalities. The Authority is invested with extensive powers under the act, including the power of eminent domain. For the administration of the sewage system operations the Authority entered into a management contract with the Municipal Management Company, and for the billing and collecting of the sewer rentals it executed a service agreement with the Citizens Water Company of Washington. A finance agreement in the nature of a trust indenture was also entered into with the Mellon National Bank and Trust Company. The management and finance agreements were for terms of forty years and the contract for the calculation and collection of sewage charges was to operate for twenty years.

[1] Act of May 2, 1945, P. L. 382, as amended, 53 P.S. §§301-322.

The complaint of the appellants, residents of the City of Washington and the Borough of East Washington, was filed on December 4, 1953, and on preliminary objections thereto it was dismissed by the lower court with limited leave to amend. On appeal to this Court, we granted the right to amend generally. 378 Pa. 641, 107 A. 2d 871 (1954). Subsequently, the plaintiffs filed an amended complaint, the defendants answered, and after a hearing the complaint was dismissed by the chancellor. From the dismissal by the court *en banc* of the plaintiffs' exceptions to the decree of the chancellor, the present appeals have been taken.[2]

It is unnecessary to discuss and decide each of appellants' numerous contentions because we are of the opinion that their action is barred by laches.

From the opinion of the court below we quote with approval: "On March 29, 1950, the City enacted its ordinance, indicating its intention and desire to organize the Authority. On April 3, 1950, the Borough passed a similar ordinance. On May 19, 1950, the Authority was chartered. On June 17, and June 25, 1953, the ordinances imposing the sewer rentals were passed. As the Chancellor pointed out in the adjudication, 'Each of these ordinances referred to the agreements between those municipalities and the Authority, the nature of the sewer project, the proposed conveyance of the municipalities' sewer systems to the Authority, and a statement as to how the sewer rentals were to be charged and collected.' Shortly thereafter, both of the ordinances were published. The present

[2] The facts of this case are reported in greater detail at 378 Pa. 641, 107 A. 2d 871 (1954).

action was filed on December 4, 1953, more than 5 months after the publication dates of the ordinances last mentioned.

. . .

". . . On April 4, 1953, the advertisements for construction bids were published; on April 27, 1953, the bids were opened; on May 27, 1953, the Management and Service agreements were signed and the bond bid was accepted; on June 25, 1953, the City conveyed its sewer system to the Authority; and on July 1, 1953, billing of the sewer rental charges was begun. Certainly on this last mentioned date, if not before, all the citizens of the City and Borough who were using the sewer system were put on notice of what had transpired. Yet, nothing was done for 5 months. In the meantime, the bonds were sold, the deeds were recorded, construction of the disposal plant was begun and payments on account of construction, amounting to some $200,000, were made. Clearly, to now overlook and excuse the plaintiffs' delay would prejudice the Authority, the bond holders, the Management Company, the Water Company, and the Trustee." On the authority of *Neizer v. Schuylkill Township School District*, 384 Pa. 323, 121 A. 2d 93 (1956) the determination of the court below must be affirmed.

No inference is to be drawn from our action in this matter that we approve the surrender of power and managerial control by the Authority through the device of long-term contracts. *Mitchell v. Chester Housing Authority*, 389 Pa. 314, 132 A. 2d 873 (1957).

Decree affirmed at the cost of the defendant Authority.

Mr. Justice Musmanno dissents.

EXHIBIT "H"

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA

No. 5146 in Equity

LUCIAN CILETTI et al.,

Plaintiffs

vs.

CITY OF WASHINGTON et al.,

Defendants

PLAINTIFF'S MEMORANDUM RE LACHES

Plaintiffs have never sought for, nor have they ever requested, any curtailment of use of the sewer system which was available to the people for many years prior to July 1, 1953, and thereafter. Nor have they ever objected to or sought to prevent any lawful improvement to or extension of that system.

Nor do plaintiffs contend that any part of the present system should be obstructed or removed.

Furthermore, plaintiffs expect to pay every reasonable and lawful charge.

Even innocent bondholders can be accorded all the protection the law would allow.

Therefore, none of these things is available in support of the plea of laches.

On the other hand, in no conceivable way can the doctrine of laches prevent the Court from finding, inter alia:

1. Defendants' failure to publish the annual audits was illegal.

2. The contracting for sewer work by the Citizens Water Company with Municipal Management Company in the amounts shown was illegal.

3. The Service and Management Agreements with the Citizens Water Company and Municipal Management Company respectively, are against public policy and against the express provisions of the Authorities Act.

4. The Service and Management Agreements are against public policy because, inter alia, they contract away the right of the plaintiffs, and succeeding generations, to avail themselves of the benefits of remedial legislation passed, i.e. statutes and/or amendments, that have been passed, and that can be expected to be passed.

5. The Service and Management Agreements are illegal for the other reasons presented by plaintiffs.

6. The so-called "rental" charges are actually illegal taxes.

7. The ordinances imposing the taxes are illegal.

8. The charge should be corrected and the equities adjusted in accordance with the *Gericke* case, and the *Hamilton* case.

9. There should be accounting and surcharges.

10. The dismissal of plaintiffs' complaint creates a precedent which would license and invite numberless instances of duplication throughout this Commonwealth.

11. The other requests of plaintiffs should be adopted.

The case at bar is not one for the application of laches. (See plaintiffs main brief, pp. 55, 56) Defendants' best efforts in re laches was to cite the *Neizer* case, a case whose inapplicability plainly appears from the following excerpts:

The lower Court said (7-Chester Co.-10):

"In granting plaintiffs leave to amend their Complaint, the Chancellor went beyond what he was required to do.

"There is a presumption of regularity about the actions of school directors as a body; we must presume *in the absence of any averment to the contrary* that they complied with the law, that the contract for construction and alterations was let after competitive bidding to the lowest responsible bidder."

And later, in 7-Chester Co.-75, the Court en banc said,

"Plaintiffs have filed but one exception to the adjudication of the Chancellor, and that is directed to the decree nisi, dismissing the Complaint and directing that judgment be entered for the defendants.

"We also agree with the Chancellor that *the Complaint does not set forth a cause of action.*

"No bad faith on the part of the school board is alleged. . . ."

"We must take judicial notice that the law requires that in public contracts, such as this, invitations to bid must be advertised and the contract let

to the lowest responsible bidder. *There is no allegation that the defendants failed to comply with these requirements.*"

"We know of no more important a public project than building a *school.*"

Finally, our Supreme Court said (emphasis supplied):

"The plaintiffs filed but a single exception which was directed to the decree nisi.

"Both the learned chancellor and the court en banc correctly applied the pertinent legal principles to the *facts which were not only undisputed but were unexceptionably established as the record plainly reveals.*"

In the Neizer case there was not even any allegation of fraud or of facts constituting abuse of discretion, much less any proof thereof. That case was decided on the pleadings.

Plaintiffs submit that the *Neizer* case has no more application to the case at bar than it would to the *Driscoll* case treated at length in plaintiffs' main brief.

If laches were applicable to the case at bar the Court would have sustained defendants' motions for dismissal made at the close of plaintiffs' testimony. When the Court refused those requests, the record consisted of some 646 pages of testimony given by defendants' own witnesses, called as for cross-examination, wherein they testified comprehensively on every phase of the matters in issue.

In considering laches, the case must be viewed as of December 4, 1953, when the Complaint was filed. The situation on that date is accurately outlined in plaintiffs' main brief, pages 55, 56.

Defendants' pretensions to prior concern for the "public" on whose behalf they unfurl the doctrine of laches, merits no comment.

Respectfully submitted,
ANTHONY L. MARINO,
EUGENE C. SLOAN,
WILBUR F. GALBRAITH.

COPY OF DEFENDANTS' ANSWER TO PETITION FOR REARGUMENT

Reed, Smith, Shaw & McClay
P. O. Box 2009
Pittsburgh, Pennsylvania

March 28, 1958

Hon. Charles Alvin Jones
Supreme Court of Pennsylvania
Pittsburgh, Pennsylvania

Re: Ciletti et al., Appellants
v.
City of Washington et al.
(Washington Sewer Authority Case)
Nos. 63, 64 March Term, 1957

Dear Mr. Chief Justice Jones:

Wilbur F. Galbraith, Esq., of counsel for the appellants, has supplied us with a copy of appellants' petition for reargument in the above case, filed on March 28, 1958. At the time, Prothonotary Bolsinger asked that our answer to the petition, if we intend to file one, be in his hands by the early part of next week.

After conferring with Ernest Von Starck and Gilbert Helwig, co-counsel in the case, our conclusion is that it would be of no practical assistance to the court to file an answer to appellants' petition, because the reasons and arguments contained therein are patently erroneous or irrelevant. Further, some of the appellants' reasons are now being advanced for the first time. Of course, if the court prefers that an answer be filed, we shall gladly comply, upon being advised by Mr. Bolsinger.

I am sending a copy of this letter to Mr. Galbraith.

Very respectfully,

Elmer W. Marshall

EWM:dc

cc: Wilbur F. Galbraith, Esq.

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA

No. 5146

In Equity

Lucian J. Ciletti et al.

v.

City of Washington et al.

EXCEPTIONS TO PLAINTIFFS' BILL OF COSTS

Defendants respectfully except to the plaintiffs' bill of costs and to the taxation thereof for the following reasons:

Appendix A Exceptions to Bill of Costs

1. To the extent that plaintiffs' bill of costs relates to items relative to the appeals at Nos. 63 and 64 March Term, 1957 in the Supreme Court of Pennsylvania, said bill of costs is premature, because the record of these proceedings has not yet been returned to the prothonotary of this Court. To the extent that said bill of costs might relate to matters occurring prior to the aforesaid appeals, said bill of costs is out of time, and not in compliance with the rules of this Court.

2. Plaintiffs' printing bills cannot lawfully be taxed as costs in the above proceeding, for the reason that the plaintiffs are not the party in whose favor the final decision on said appeal was rendered, and the taxation of said printing bills as part of the costs of this proceeding has not been and could not be required by the Court.

Dated: July 30, 1958

(s) Alexander R. Curran
(s) Elder W. Marshall
(s) Gilbert J. Helwig
(s) Reed, Smith, Shaw & McClay
Attorneys for Defendants

ACTS OF ASSEMBLY INVOLVED

ACT OF MAY 2, 1945, P. L. 382, 53 PURDON'S STATUTES

Sec. 301. Short title

This act shall be known and may be cited as the "Municipality Authorities Act of 1945." 1945, May 2, P. L. 382, Sec. 1.

Sec. 302. Definitions

The following terms whenever used or referred to in this act shall have the following meanings, except in those instances where the context clearly indicates otherwise:

(a) The term "Authority" shall mean a body politic and corporate, created pursuant to this act or pursuant to the "Municipality Authorities Act of 1935" repealed hereby.

(b) The term "Board" shall mean the governing body of an Authority.

(c) The term "bonds" shall mean and include the notes, bonds and other evidence of indebtedness or obligations which each Authority is authorized to issue pursuant to section 4(i) of this act.

(d) The term "Municipal Authority" shall mean the body or board authorized by law to enact ordinances or adopt resolutions for the particular municipality.

(e) The term "construction" shall mean and include acquisition and construction, and the term "to construct" shall mean and include to acquire and to construct, all in such manner as may be deemed desirable.

(f) The term "municipality" shall mean any county, city, town, borough, township or school district of the Commonwealth of Pennsylvania.

. . . . . .

(h) The term "improvement" shall mean and include extension, enlargement and improvement; and the term "to improve" shall mean and include to extend, to enlarge, and to improve all in such manner as may be deemed desirable.

(j) The term "project" shall mean any structure, facility or undertaking which an Authority is authorized to acquire, construct, improve, maintain or operate under the provisions of this act. 1945, May 2, P. L. 382, Sec. 2; 1952, Jan. 21, P. L. (1951) 2188, Sec. 1.

Sec. 303. Method of incorporation

A. Whenever the municipal authorities of any municipality singly or of two or more municipalities jointly shall desire to organize an Authority under this act, they shall adopt a resolution or ordinance signifying their intention to do so.

Thereafter the municipal authorities of such municipality or municipalities shall cause a notice of such resolution or ordinance to be published at least one time in the legal periodical of the county or counties in which such Authority is to be organized, and at least one time in a newspaper published and of general circulation in such county or counties. Said notice shall contain a brief statement of the substance of said resolution or ordinance, including the substance of such articles making reference to this act, and shall state that on a day certain, not less than three days after publication of said notice, articles of

horticultural perishable foods during the growers' harvest season when such persons are engaged in canning or preserving the farmers' perishable products.

§ 4301.03 Board may issue rules and regulations. (GC § 6064-3)

The board of liquor control may adopt and promulgate, repeal, rescind, and amend, in the manner required by this section, rules, regulations, standards, requirements, and orders necessary to carry out Chapters 4301. and 4303. of the Revised Code, including the following:

• • • • •

(I) Rules, regulations, and orders with reference to sales of beer and intoxicating liquor on Sundays and holidays and with reference to the hours of the day during which and the persons to whom intoxicating liquor of any class may be sold, and regulations with reference to the manner of sale;

§ 4301.22 . . .

(D) No sales of intoxicating liquor shall be made after two-thirty a.m. on Sunday or on election day between the hours of six a.m. and seven-thirty p.m.

This section does not prevent a municipal corporation from adopting an earlier closing hour for the sale of intoxicating liquor on Sunday or to provide that no intoxicating liquor may be sold on Sunday.

NOV 2 5

IN THE

Supreme Court of the United States

No. 420

COLEMAN ULLNER,

Appellant,

v.

THE STATE OF OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF OF OHIO CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION, *AMICI CURIAE*, IN SUPPORT OF JURISDICTION

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Attorneys for Amici Curiae

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IN THE

Supreme Court of the United States

No. 426

COLEMAN ULLNER,

Appellant,

—v.—

THE STATE OF OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF OF OHIO CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION, *AMICI CURIAE*, IN SUPPORT OF JURISDICTION

Interest of *Amici*

The Ohio Civil Liberties Union and the American Civil Liberties Union, appearing herein as *amici curiae* with the consent of both the parties filed with the Clerk of this Court, are non-profit, non-partisan organizations dedicated to the advancement of the constitutional rights of all people in the United States. The American Civil Liberties Union functions through a national organization, twenty-four state or local affiliates, and representatives in all of the remaining states. The Ohio Civil Liberties Union is a state affiliate of the American Civil Liberties Union.

The issues presented in this case now being considered by the Court on the question of jurisdiction are, of all those involving federal constitutional rights, among the most recurrent and vexing to arise locally in all parts of the country.

Amici believe that this case involves an abridgment of one of the most fundamental of these rights, that of religious liberty; and an infringement upon one of the most fundamental of the constitutional prohibitions, that against making of laws concerning the establishment of religion.

Because the Court has refused for over fifty years[1] to accept jurisdiction to review the validity of the numerous and discriminatory state laws and municipal ordinances placing restrictions and prohibitions upon activities for both business and pleasure that may be engaged in on the predominantly observed Christian Sabbath, Sunday, there has arisen numerous prosecutions and other legal actions in the various states and in the lower federal courts[2] in which the federal constitutional questions are raised but left unresolved.

Amici respectfully suggests that the accepting of jurisdiction and the review by the Court of this case,[3] by defining (at least in part) the limits that the Constitution places upon State powers to control otherwise lawful activities that may be pursued on Sunday, will apprise both the States and their residents of their rights and thereby have the additional salutary result of a substantial reduction of litigation.

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[1] Most recently in *Grochowiak* v. *Pennsylvania*, No. 166, October Term, 1958, appeal dismissed October 13, 1958, rehearing denied November 24, 1958.

[2] On November 22, 1958, an order temporarily restraining the District Attorney of Lehigh County from enforcing the laws prohibiting sales on Sunday was issued by the U. S. District Court "pending convening of a three-judge court and issuance of its order, or until further order of this court." This restraining order was dismissed on November 25, 1958, but an appeal is pending. *Two Guys from Harrison—Allentown, Inc.* v. *Paul A. McGinley*, Civil Action No. 25626, U. S. D. C., E. D. Pa.

[3] Also pending before the Court on a Jurisdictional Statement requesting review of the final decision of the Supreme Court of Ohio is *Kidd* and *Mills* v. *Ohio*, No. 465, October Term, 1958.

Argument

Jurisdiction in this case is sought in order to test the constitutionality of Section 3773.24 of the Revised Code of Ohio. That statute requires persons over the age of 14 years who are engaged in unexcepted trades to observe Sunday as the day of rest and to refrain from conducting their businesses on that day. The section does not apply to work of "necessity or charity" and does not extend to persons who "conscientiously" observe the seventh day of the week as the "Sabbath" and abstain thereon from doing things prohibited on Sunday. The facts in the case are adequately set forth in appellant's Jurisdictional Statement as are the relevant statutory provisions. They shall not be repeated here.

The plain effect of this statute, as construed by the court below, is to require persons engaged in certain retail trades who observe a day other than Saturday or Sunday as their Sabbath to refrain from engaging in their trade two days each week, while other persons whose religion commands them to observe either Sunday or Saturday as their Sabbath are required to close their business only one day each week.

I. The constitutionality of Section 3773.24 as construed by the court below raises a substantial question of federal constitutional law under the First and Fourteenth Amendments of the United States Constitution and should be reviewed by this Court.

This Court need hardly be reminded of its constant adherence to the principle that the Fourteenth Amendment to the United States Constitution, including as it does the guarantees of religious freedom contained in the First Amendment, has erected a "wall of separation between

church and state." This adherence has been over the years a cornerstone of our religious liberties. As stated by this Court in *Everson* v. *Board of Education*, 330 U. S. 1, 15 (1946),

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. . . . "

(See also *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943), *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943), and the recent case of *First Unitarian Church* v. *Los Angeles*, —— U. S. ——, 2 L. Ed. 2d, 1484 (1958).)

The statute under consideration prohibits most people in Ohio from working on Sunday. It excepts from this prohibition works of "necessity and charity," never clearly defined, and it excepts those people whose conscientious religious beliefs prevent them from working on Saturday.[4] It makes no provision for those people whose religious beliefs require them to rest on a day other than Saturday

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[4] The most recent statistics concerning the leading religious faiths in the United States which observe Saturday as the Sabbath show: Jewish congregations—5,500,000; Seventh Day Adventists—291,567; Seventh Day Baptists (General Conference)—5,965; The Church of God (Seventh Day), Denver, Colorado—4,300; and Church of God (Seventh Day)—2,000. *Yearbook of American Churches*, Edition for 1959. National Council of Churches of Christ in the U. S. A., New York.

or Sunday, and it makes no provision for those whose principles do not require any day of rest. It, therefore, forces both these latter groups to refrain from work on Sunday.

Many of our citizens belong to religious groups which require them to refrain from work on days other than Saturday and Sunday.[3] The effect of RC Section 3773.24 is clear. Since the statute forces them to refrain from working on Sunday and their religion requires them not to work on another day, they are limited to five days a week in which to earn their bread. On the other hand, those whose day of religious observance happens to coincide with the provisions of the statute are allowed to work six days a week. The same is true for those who have no formal religious belief. Thus the discrimination which results from an application of this statute is made clear. It is precisely the same as if the state had passed the statute saying that the people of "X" religion or the people of no religion were allowed to work six days a week while the people of "Y" religion were allowed to work but five. It is clear that under the opinions of this Court, cited above, and the many others cited by appellant, such a statute would be declared unconstitutional as violative of the Fourteenth Amendment. Such a result must apply here as well. The economic discrimination which results from an application of the statute in question clearly aids the people of one religious group over those of another by giving the former an advantage in their pursuit of economic gain. In essence, the state is imposing a serious financial obstacle in the path of free exercise of an individual's religious beliefs. This it cannot do. As was said by this Court in *Murdock* v. *Pennsylvania, supra* (p. 113), "A state may not impose a

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[3] For example, according to the *Islamic* Center, Washington, D. C., there are approximately 70,000 Moslems in the United States who observe Friday as their Sabbath.

charge for the enjoyment of a right granted by the Federal Constitution."

Notwithstanding the fact that Section 3773.24 so clearly violates the guarantees of religious freedom contained in both the First and Fourteenth Amendments to the Constitution, the respondent contends that it should be upheld as a proper exercise of the state's police power in support of the public welfare. In short, respondent claims that the statute has nothing to do with religion but is merely an attempt by the state to insure that its citizens get a certain amount of rest each week. They say this in the face of historical research which clearly indicates the religious basis of Sunday legislation. See Chapters XIX and XX, *Separation of Church and State in the United States,* Johnson and Yost, University of Minnesota Press, 1948. Moreover, they could say this in the face of a clear recognition by courts themselves of the religious basis of Sunday legislation. See, for example, the statement of the Supreme Court of Georgia as quoted in *Hennington* v. *State of Georgia,* 163 U. S. 166 (1896):

> "With respect to the selection of the particular day in each week which has been set apart by our statute as the rest day of the people, religious views and feelings may have had a controlling influence. We doubt not that they did have; and it is probable that the same views and feelings had a very powerful influence in dictating the policy of setting apart any day whatever as a day of enforced rest."

Indeed, the purely religious nature of the statute in question can be seen most clearly from an examination of its companion statutes in Ohio. Ohio Revised Code 3773.23 prohibits among other things theatrical and dramatic exhibits on Sunday and baseball playing and motion pictures in the forenoon on that day. Ohio Revised Code 3773.25

forbids on Sunday sporting, hunting, fishing or shooting, among other things. It is clear from these particular prohibitions that rest from toil was not the main object of these statutes. Not even respondents would claim that seeing a play or a movie, or playing baseball is "work" detrimental to the health of the citizenry. The plain fact is that these Sunday prohibitions were enacted to prevent activity on Sunday which would detract from its significance as a day of worship. It is certainly in keeping with this conclusion to note that the statute in question was originally entitled "Sabbath Desecration."

Moreover, even assuming that there were no religious basis for the statute in question, it cannot be denied, as shown above, that the application of this statute results in religious discrimination. It is claimed by respondent that such discrimination is outweighed by the beneficial effects of the statute, namely, the improvement of the public health and welfare. And yet there is no substantial relation between the statute and its purported objective. As is clear from appellant's brief and is undenied by respondent, Section 3773.24 and its companions have been more honored in their breach than in their observance.

There is no reason to suppose that in the present day all those who shop on Sunday or do business on Sunday are endangering their health. In fact, these statutes were passed at a time when states had not yet regulated the number of hours a person might properly work in any given day or week. Society has changed a great deal since those times and today, due in large measure to decisions of this Court, states can regulate and have regulated the length of time within which it is deemed healthful for a man to work. It need hardly be added that these regulations are substantially related to the public health. It also need hardly be added that these regulations are concerned with rest from toil and not with particular days of rest.

It is not contended either by appellant or by *amici* that the State of Ohio or any other state could not so regulate the number of hours per week within which a man might work. It is contended, however, that there is no substantial relation between such a health measure and the insistence by a state that people take their rest on one particular day as opposed to any other. As was stated by this Court in *Hennington* v. *State of Georgia, supra,* p. 304,

> "The well settled rule is that if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution."

Not only does the statute under consideration, specifying as it does a particular day of the week upon which people must rest, have no real relation to such objects, it is in addition a clear invasion of "rights secured by the fundamental law" and it, therefore, should be declared unconstitutional.

II. The frequency of this question, the confused application of statutes such as this, and the increased difficulty of their enforceability make necessary a present consideration of the merits by this Court.

As is clear from the Appendix hereto and from an examination of Appellant's brief, more than half of the states of this Union have Sunday laws similar to the statute under consideration. Attached to these statutes are specific exceptions of various kinds, most of which have no real relation to the articulated purpose of the statutes and are rather the result of activity by private pressure groups.

In some instances, these statutory exceptions have been struck down on the grounds that they result in unreasonable discrimination. (See, for example, *Henderson* v. *Antonacci*, 62 S. 2nd 5 (1952), and *Kelley* v. *Blackburn*, 95 S. 2nd 260.) In most instances, however, state courts have refused to grant non-Sunday worshipers relief from the discriminatory provisions of state statutes.

As can be seen from an article in Time Magazine of October 22, 1956, Vol. LXVIII, No. 17, page 98, there is at present a widespread national non-observance of much of this Sunday legislation. Such general non-observance indicates both a dissatisfaction with the principles behind such legislation and a clear lack of connection between these laws and the public health. Despite the changed times in which we now live and despite the current prevalence of laws regulating work which are not based upon religion, this Court has not considered the merits of the constitutionality of these Sunday laws for 58 years. See *Petit* v. *Minnesota*, 177 U. S. 164 (1900). There has therefore been nurtured an anachronism in the law which is no longer of benefit to the community and which violates fundamental constitutional rights.

This Court has often exercised its power of review over constitutional questions which have been the subject of recurrent litigation in courts below and which must be reexamined in the light of the present. (See *Brown* v. *Board of Education*, 347 U. S. 483 (1954), *Teamsters Union* v. *Vogt, Inc.*, 354 U. S. 284 (1957), and many others cited by appellant's brief.) In like manner, the instant case, involving as it does the vital right to freedom of religion, is a worthy and important object of the Court's attention.

CONCLUSION

Section 3773.24 of the Revised Code of Ohio is a clear violation of the constitutional provisions guaranteeing freedom of religion. Its application results in an illegal discrimination between people of different religious sects. It has no substantial relation to the valid police power of the state. Because of the overriding importance of the principle involved, this Court should reexamine the constitutionality of this statute in the light of recent cases and recent times, and thereby assure to the people the continued protection of their Constitution.

Respectfully submitted,

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Attorneys for Amici Curiae

APPENDIX

Survey of Sunday Observance Laws

A preliminary survey made by the American Civil Liberties Union through its affiliates and state correspondents produced information concerning Sunday laws in twenty-seven states. If the Court accepts jurisdiction, *amici* hope to submit a more comprehensive survey of the laws of all forty-eight states. A sampling of these laws now, however, may be useful.

1. States which prohibit all work[1] on Sunday except that of "necessity or charity" (or equivalent exceptions):

a. without exempting individuals who observe Saturday as the Sabbath:

Connecticut	Nebraska
Colorado	New Hampshire
Florida	Pennsylvania
Louisiana	Rhode Island
Minnesota	Tennessee

b. exempting individuals who observe Saturday as the Sabbath:[2]

Indiana	New Jersey (in part)
Massachusetts	West Virginia

c. exempting individuals who observe a day other than Saturday or Sunday as the Sabbath:[3]

Kentucky	Texas
North Dakota	

[1] All state laws examined have incorporated numerous exceptions ranging from antique selling in Connecticut to a total of approximately ninety in Massachusetts.

[2] To come within this exemption, the person must "conscientiously" observe his Sabbath.

[3] See Footnote 2.

2. A few of the activities variously prohibited on Sunday without regard to the Sabbath day observed:[4]

a. Professional Sports

Boxing
Wrestling
Horse Racing
Billiards
Football
Baseball
Ice Hockey
Cock-fighting

b. Retail Occupations

Automobile Sales
Tobacco Selling
Cleaning and Dyeing
Bootblacking
Barbering
General Selling
Public Auctions
Alcoholic Beverage Selling

c. Recreational Activities

Public Dancing
Theatrical Performances
Motion Pictures
Hunting
Sport Generally
Cards and Games of any Kind

3. States which have no Sunday observance laws:

California (except for boxing)
Illinois
Utah

[4] But some of these are prohibited during specified hours only in some states.